(3)

No. 85-1066

Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

JAMES G. MARTIN, et al.,

Appellants,

v.

TERRY L. HAITH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

C. Allen Foster
*Kenneth J. Gumbiner
P. O. Drawer 20004
104 North Elm Street
Greensboro, North Carolina 27420
Telephone: (919) 273-1733

Counsel for Appellee Terry L. Haith
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION TO AFFIRM 1

STATEMENT OF FACTS 2

ARGUMENT 3

I. The North Carolina Session Laws at issue in this case are subject to the preclearance requirement of Section 5 of the Voting Rights Act 4

A. The preclearance requirements of Section 5 are to be applied broadly 4

B. The Voting Rights Act should apply to the election of judges 8

II. The facts of this case do not excuse the failure of the State to obtain preclearance 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Education, 393 U.S. 544 (1969) 6, 11

City of Richmond v. United States, 422 U.S. 358 (1975) 7

Dotson v. City of Indianola, 514 F.Supp. 397 (N.D. Miss. 1981), *aff'd*, 456 U.S. 1002 (1982) 13

Dougherty County, Georgia, Board of Education v. White, 439 U.S. 32 (1978) 7

Georgia v. United States, 411 U.S. 562 (1973) 7

Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972) 9

McCain v. Lybrand, 465 U.S. 236 (1984) 14

Perkins v. Matthews, 400 U.S. 379 (1971) 7

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) 7

Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980) 9, 10

STATUTES:

28 U.S.C. § 2284 3

42 U.S.C. § 1973(a) 4, 10

42 U.S.C. § 1973(c) 2, 3, 4, 11, 12

42 U.S.C. § 1973(l) 5

Chapter 262, North Carolina Session Laws of 1965 ..... 2, 14

Chapter 997, North Carolina Session Laws of 1967 ..... 2, 14

Chapter 1119, North Carolina Session Laws of 1977 2

Chapter 1130, North Carolina Session Laws of 1977 3

Chapter 1238, North Carolina Session Laws of 1977 3

TABLE OF AUTHORITIES—Continued

Page

Chapter 1109, North Carolina Session Laws of 1983 3

28 C.F.R. § 51.25 14

LEGISLATIVE HISTORY:

Voting Rights Act Extension: Report of the Committee on the Judiciary United States Senate on S. 1992, S. REP. No. 97-417, 97th Cong., 2nd Sess. (1982) 5

No. 85-1066

In The

Supreme Court of the United States

October Term, 1985

JAMES G. MARTIN, et al.,

Appellants,

v.

TERRY L. HAITH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States that the order and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT OF FACTS

This action was commenced by Appellee Terry L. Haith, a black citizen and registered voter of Guilford County, North Carolina, because several state statutes affecting voting were not precleared under Section 5 of the Voting Rights Act (hereinafter sometimes the "Act"). 42 U.S.C. § 1973(c). Forty of the state's 100 counties are jurisdictions covered under the Act and, hence any changes which affect voting in these counties are subject to the preclearance requirements of the Act. There is no dispute that the legislation in question was not formally precleared.

The North Carolina laws challenged by Mr. Haith in the lower court all affected the election of Superior Court judges in North Carolina. The first law in question was Chapter 262 of the Session Laws of 1965, passed by the North Carolina General Assembly. This law, passed shortly after the passage of the Act, changed the existing law by creating, for the first time in North Carolina, the requirement that judicial candidates in multi-seat districts designate the seat for which they are running. The second law in question was Chapter 997, Session Laws of 1967. This law changed the existing law by creating additional resident Superior Court Judges in certain judicial districts and by staggering the terms for the election of the judges in those districts. The third law in question was Chapter 1119 Session Laws of 1977. This act added judicial seats in several other judicial districts and, again, created staggered terms for those judges. In many instances staggering the terms in an election means that the judges stand for election at a time different from other

judges in their district. The fourth and fifth laws in question are Chapters 1130 and 1238, Session Laws of 1977. These laws abolished certain judicial districts and created new, divided ones, in their place. Finally, in 1983 the General Assembly enacted Chapter 1109 which again added Superior Court Judges and staggered their terms in yet other judicial districts. None of these laws has ever been precleared.

Suit was filed by Mr. Haith in the United States District Court for the Eastern District of North Carolina and was assigned for hearing to a three-judge panel pursuant to 42 U.S.C. § 1973(c) and 28 U.S.C. § 2284. On September 16, 1985, argument was heard by the panel on cross-motions for summary judgment filed by both parties. By Order and Memorandum Opinion dated September 17, 1985, the panel ruled in favor of Mr. Haith and held that the North Carolina Session Laws in question are subject to the preclearance requirements of the Voting Rights Act. Thereafter, a direct appeal was taken to this Court as allowed by law.

—o—

ARGUMENT

Mr. Haith has moved this Court to affirm the decision of the three-judge panel below on the grounds that the question presented concerning Section 5 of the Voting Rights Act is so unsubstantial as not to warrant further argument. Mr. Haith contends that, as shown hereinafter, the decision of the lower court is clearly correct and there is no need for this Court to reconsider well settled issues pertaining to the Voting Rights Act.

I. THE NORTH CAROLINA SESSION LAWS AT ISSUE IN THIS CASE ARE SUBJECT TO THE PRECLEARANCE REQUIREMENT OF SECTION 5 OF THE VOTING RIGHTS ACT.

A. The Preclearance Requirements Of Section 5 Are To Be Applied Broadly.

The appeal of the lower court's decision in this case asks this Court to consider the applicability and scope of § 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). This provision is, of course, part of a broader statutory scheme and to be understood it must be viewed in the context of the entire Act. In particular, the first section, 42 U.S.C. § 1973, contains the general prohibition against discriminatory voting practices and relates to the requirements of § 5. As amended by Congress in 1982, this provision states in pertinent part,

> § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

The plain language of this provision makes it clear that the Act applies to *all* standards, practices and procedures that affect voting; there is no exemption from the Act's coverage when the voting involved is for the election of any particular type of state official, including judges.

This conclusion is supported by other provisions of the Act. The definition section states,

> (c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.
>
> 42 U.S.C. § 1973(1).

No qualification to voting is recognized by this provision and no distinction is drawn between different kinds of elections. The only justifiable conclusion based on the words of the statute is, then, that no voting practice or procedure and no type of election was intended to be excluded from coverage by the Act. It is against this background that any issue regarding the application of §5 of the Act should be considered. The preclearance requirement is the initial step by which proposed changes in election laws and practices made by covered jurisdictions are reviewed and evaluated to protect the broad assurances given by the Act.

In voting to extend the Act in 1982, Congress commented on the vital importance of Section 5 preclearance and the need for its extension. See *Voting Rights Act Extension: Report of the Committee on the Judiciary United States Senate on S. 1992,* S. REP. NO. 97-417, 97th Cong., 2nd Sess. (1982). The Committee, in recommending an extension of the preclearance requirement, noted there existed "virtual unanimity among those who

have studied the record that Section 5 preclearance should be extended." *Id.* at 9. The Committee went on to note that "more sophisticated devices that dilute minority voting strength" have arisen as a result of the initial application of the Act and cited its awareness of the devices as justification for the continued and vigorous requirement of preclearance. *Id.* at 10. Significantly, no qualification or limitation on preclearance was ever suggested by the Committee.

In addition to the language of the Act and recent legislative history, the decisions of this Court support the conclusion that the Act requires preclearance of all laws affecting any voting rights. A majority of this Court has consistently held that the Act, including the preclearance required by Section 5, should be broadly construed. A clear statement of this rule is contained in *Allen v. State Board of Elections,* 393 U.S. 544 (1969). The appellants in that case challenged a number of state enactments on the ground they were covered by the Act and hence subject to the preclearance rule. The laws dealt with the election of county supervisors and members of a local board of education, independent candidacy in general elections, and handwritten ballots. The Court held that these laws fell within the scope of the Act and were subject to preclearance. The Court stated:

> We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements.
>
> The legislative history on the whole supports the view that Congress intended to reach any state enact-

> ment which altered the election law of a covered State *in even a minor way.* (Emphasis added).
>
> 393 U.S. at 566.

In the subsequent decisions of this Court concerning the Act, the Court has consistently held that the preclearance requirements are not to be viewed restrictively. Thus, preclearance has been required for laws adopting at-large voting, *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978); *Perkins v. Matthews,* 400 U.S. 379 (1971); to changes in polling locations, *Perkins, supra;* to legislative reapportionment plans, *Georgia v. United States,* 411 U.S. 526 (1973); to a local rule requiring candidates for elective office to take an unpaid leave of absence from work. *Dougherty County, Georgia, Board of Education v. White,* 439 U.S. 32 (1978); and to laws pertaining to annexation, *City of Richmond v. United States,* 422 U.S. 358 (1975).

The North Carolina Session Laws in question fall well within the parameters set out by the facts of these cases and the interpretation of the Act as set out by this Court. From 1965 to 1983 the challenged Sessions Laws established, *inter alia*: a system of numbered seat elections for superior court judges in multi-member districts; new judgeships within existing districts (thus creating "multi-member" districts); staggered terms (the equivalent of numbered seats because they preclude "single-shot" voting by minorities); and entirely new judicial districts. These changes are clearly voting standards, practices and procedures subject to the Act and, hence, must be precleared, unless this Court is prepared to rule, as the State argues, that the Act does not apply to the election of judges.

The three-judge panel below held the Act applies to the election of judges and this Court should affirm that decision.

B. The Voting Rights Act Should Apply to the Election of Judges.

The State argues in its Jurisdictional Statement that voting for judges is somehow different from voting for other elected officials. It contends that the interests of judicial economy—i.e., the State's desire to "ease congestion in its courts by creating new judgeships" should outweigh the protections afforded by the Act. Appellants' Brief at 4. The State further argues the creation of new judgeships, of numbered or "designated" seats, and staggered terms are "perfectly ordinary governmental decisions" that should not have to be precleared. Appellants' Brief at 4-5. Significantly, however, the State does not argue that if these "perfectly ordinary governmental decisions" were applied to other elected officials, then preclearance would not be necessary. Thus, most of the State's argument is irrelevant to the question presented: does the Voting Rights Act apply to the election of judges?

The State also argues that judges are not representatives in the same sense as, say, legislators or councilmen and are largely confined to interpreting rather than making laws, therefore, judicial elections should not be subject to the Act. This argument ignores the fact that judicial voting laws are still "voting" laws and, therefore, have the same potential for jeopardizing fair voting as any other voting rule or practice. It is naive to believe

that no discrimination or "abridgement" could result from a voting law change simply because the reform deals with judicial elections. The risk of prejudice to voting in judicial elections is the same as in any other type of election.

When the State itself decided that judges in North Carolina should be elected by the people of the state in an at-large election, it announced that it was important for the people of the state to cast their ballots for the candidates of their choice. Having made this decision, it is at best inconsistent to argue the Act does not protect the right of some of these people to cast effective ballots in those elections.

The State's reliance on *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1972), *aff'd*, 409 U.S. 807 (1972), and other cases is misplaced. These cases concerned constitutional challenges to judicial election laws and do not address the separate and distinct issue of whether the Voting Rights Act applies to such laws.*

In other contexts, courts have recognized the importance of constitutional safeguards as applied to judicial elections. In *Voter Information Project v. City of*

---

*It is submitted that if the *Holshouser* case had been decided on the present facts the views of Judge Craven in dissent in that case would have prevailed in the majority opinion. As stated in the dissenting opinion, "I agree with my brothers that judges need not be elected, but if the state chooses to elect them, I think its election scheme must accord to the voters equal protection of the laws." 335 F.Supp. 934. This view succintly states the position of Mr. Haith, acknowledged by the three-judge panel, that a state need not elect its judges but, if it does, then the protections afforded by the Voting Rights Act must be followed.

Baton Rouge, 612 F.2d 208 (5th Cir. 1980), a constitutional challenge was raised to an at-large scheme of judicial elections on the ground the scheme created impermissible dilution. The lower court dismissed the complaint and the Fifth Circuit reversed, noting that dilution of voting strength along racial lines was clearly prohibited by the Constitution. The Court rejected appellant's arguments that judicial elections enjoy a special status because of the role of judges and concluded by stating,

> It may well be true that Judges are elected to serve the people, not to represent them. But this fact makes plaintiffs' claims of racial discrimination no less important and no less deserving of constitutional protection.
>
> *Id.* at 212.

The rationale of the *Voter Information Project* case applies equally to this case. The fact that the election laws at issue pertain to judicial elections does not exempt them from the substantive protection of § 2 of the Voting Rights Act or the preclearance requirements of the Act. This Court should recognize this principle by affirming the judgment below and dismissing this appeal.

The interpretation of preclearance offered by the State confuses Section 5 and Section 2 of the Act. Certainly the test for whether a law violates the Act can be met upon a showing that the rule will cause a "denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. § 1973(a). The necessity for preclearance is, however, satisfied by a lesser showing. The language of Section 5 allows a preclearance submission to the Attorney Gen-

eral whenever a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect" on the relevant date. 42 U.S.C. § 1973(c). Clearly the preclearance test is not equivalent to the showing required to invalidate a law on grounds it discriminates against a group of voters or abridges the right to vote. The need for preclearance is, rather, triggered simply by a change in election laws by a subject jurisdiction. See *Allen,* 393 U.S. at 563. For this reason Appellants are mistaken in equating the "abridgement" test with the preclearance rule as they attempt to do.

Section 5 imposes a general and broad requirement that subject jurisdictions submit proposed voting law changes so that the discriminatory effects of the changes can be ascertained. The "abridgement" test is applied to determine if there is a violation under the Act. Obviously, if the proposed law abridges voting rights, it may ultimately be invalidated in a subsequent legal proceeding. This does not mean, however, that a covered jurisdiction can avoid preclearance because it believes the proposed changes are not discriminatory. The Act envisions preclearance as a mandatory first step in enforcement of the law and the Court should recognize no exception to this rule.

II. THE FACTS OF THIS CASE DO NOT EXCUSE THE FAILURE OF THE STATE TO OBTAIN PRECLEARANCE.

The State suggests that the State's failure to submit the session laws for preclearance is excusable given the "special circumstances" of this case. These circum-

stances are purportedly based on certain communications contained in a letter, dated April 23, 1971, sent by David L. Norman, an Acting Assistant Attorney General in the Civil Rights Division of the Justice Department, to the State. (Appellants' Appendix, Attachment D.) The State argues Mr. Norman's statements were sufficient to support the conclusion that laws concerning judicial elections need not be precleared. The State's argument is not pertinent for two reasons. First, no theory of reliance or equity or estoppel can excuse the omissions of the State in failing to preclear the laws in question.* Second, the letter is insufficient to support the State's argument that the Justice Department clearly commented on the applicability of the Act to voting for judges.

As observed by the three-judge panel, no concept of equity or reliance exists to prevent the application of the Voting Rights Act. See 42 U.S.C. § 1973; 1973(c). (Appellants' Appendix, Attachment B at A-7). Further, when the obligation of a state to avoid discriminatory election practices and procedures is at issue, principles of estoppel have no place. To permit this would recognize a defense to noncompliance which is inconsistent with the law and the intent of Congress in enacting it.

An attempt to circumvent the requirements of the Act on "equitable grounds" was rejected by a lower court

---

*The State's position that it relied on the statement of Mr. Norman in not preclearing legislation pertaining to judicial elections is contradicted by its own subsequent actions. Chapters 838 and 855, Session Laws of 1974 and Chapter 964, Session Laws of 1981 added judgeships in certain judicial districts and divided a judicial district. As conceded by the State in argument before the court below, these statutes *were* submitted to the Justice Department for preclearance.

in *Dotson v. City of Indianola,* 514 F.Supp. 397 (N.D. Miss. 1981), *aff'd,* 456 U.S. 1002 (1982). In the *Dotson* case, the defendants presented a laches defense to an injunction action brought for failure to preclear laws creating certain annexations. The three-judge panel expressly held laches was not available as a defense in a private injunction suit brought under the Voting Rights Act. The Court reasoned that to recognize such a defense would defeat the remedial purposes of the act, would be inconsistent with the duty imposed on a covered jurisdiction by Section 5, and would avoid the real issue—i.e., the legality of the annexations. 514 F.Supp. at 401.

The logic of the *Dotson* case applies to this case. For this Court to recognize the State's "special circumstances" defense would defeat the intent and purposes of the Voting Rights Act in the same manner as rejected by the court in the *Dotson* case. The State, if it relied on Mr. Norman's statement, did not do so to its detriment; the State is nothing more than the arm of its people and the people deserve the protection of the Voting Rights Act.

Additionally, the State's reliance on a one sentence passage in Mr. Norman's letter is misplaced. The State contends Mr. Norman's statement stands for the proposition that Section 5 does not apply to judicial elections. However, because of the manner in which the laws were submitted, it is not clear the Attorney General understood that the law to which he was referring concerned a change in the boundaries of an electoral district. The letter only states, "changes in the North Carolina Court system, *which did not deal with voting practices or procedures* . . . are not subject to § 5 of the Voting Rights

Act." (Emphasis added). (Appellants' Appendix, Attachment D). No indication is given as to exactly which statute is being referenced.

The confusion in the Norman letter was due to the method of submission by the State. The statutes in question were simply transmitted to the Attorney General in bulk and without any of the required explanation. (Appellants' Appendix, Attachment B.) See 28 C.F.R. § 51.25 (setting out the required contents for each submission). For this reason, Mr. Norman's remarks cannot be conclusively linked to any particular statute. Therefore, the ambiguity in the Attorney General's statement is directly traceable to the unclear and imprecise method of submission employed by the State.

Finally, the State argues it has satisfied the obligation to submit Chapter 262, Session Laws of 1965, and Chapter 997, Session Laws of 1967, because these provisions were included in later laws submitted to the Attorney General. The court below rejected this argument relying on the decision of this Court in *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037 (1984). In *McCain*, a 1971 submission to the Attorney General was made under the Voting Rights Act. The law amended an earlier statute which was itself never submitted for preclearance. This Court expressly held that the fact the later law was approved did not act as a submission and preclearance of the earlier legislation. See 104 S.Ct. at 1049. The facts of *McCain* as they relate to this question are so similar to those of the present case that the rule should be applied here and the argument of the State for submission by incorporation should be rejected.

CONCLUSION

For the reasons stated herein, the Order of the Court below should be affirmed and this appeal dismissed.

Respectfully submitted,

C. Allen Foster
Kenneth J. Gumbiner
P. O. Drawer 20004
104 North Elm Street
Greensboro, North Carolina 27420
Telephone: (919) 273-1733

Attorneys for Appellee Terry L. Haith